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United States

OCTOBER TERM, 1978
Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
vs.
BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
vs.
BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
vs.
BRIAN F. WEBER, et al.,
Respondents.

BRIEF AMICUS CURIAE FOR THE CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION AND THE CALIFORNIA DIVISION OF FAIR EMPLOYMENT PRACTICES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

This brief is filed pursuant to written consent of all parties on behalf of the Division of Fair Employment Practices (the "Division") and the Fair Employment Practice Commission (the "Commission") of the State of California.

The Division and Commission are the agencies responsible for preventing and eliminating employment discrim-

ination in California under the California Fair Employment Practice Act, California Labor Code § 1410 *et seq.* (the "California Act"). The California Act prohibits discrimination on the basis, *inter alia,* of race. This statutory scheme empowers the Division to investigate complaints of discrimination, to attempt to conciliate meritorious complaints and to initiate adversary proceedings before the Commission in those cases in which conciliation efforts prove futile. The Division and Commission also furnish technical guidance to employers who undertake voluntary efforts to eliminate discriminatory practices and conditions.

Whatever success *amici* have achieved in implementing the objectives of the California Act is largely dependent upon voluntary action by employers taken well before *amici* are compelled to invest substantial enforcement resources. In the past, voluntary measures by employers have often precluded the need for formal involvement by *amici* and have contributed to a very high conciliation rate in California. Given *amici's* limited resources and the relative enormity of their task, any significant reduction in these voluntary measures would undermine their capacity to handle those complaints which require full investigation and hearing. *Cf. Allen v. State Board of Elections,* 393 U.S. 544, 556 (1969).

Amici are concerned that affirmance of the decision below would drastically reduce employer incentives to comply voluntarily with employment discrimination laws. The initial impact upon *amici* would be an increase in the number of complaints filed with the Division and a reduction in the number of cases resolved through early conciliation. The ultimate result would be that *all* aspects of

the enforcement process, including conciliation, would suffer—and with it the people whom the process is intended to help.

Plainly, then, *amici* are vitally interested in the outcome of this case. *Amici* also believe that the points they present below are not merely cumulative of the views of the parties or of other *amici,* and that consideration of this brief thus may benefit the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whatever one's view of Title VII and the proper outcome of this controversy, we submit that the decision below is an unhappy one. It establishes principles which will materially increase the amount of litigation in a country which already has too much. It will subject employers to the Hobson's choice of conceding legal vulnerability or accepting an undesirable *status quo* until judicially told to do otherwise. Most important, it cuts against the basic principle of minimizing government involvement and encouraging creative, private solutions to problems of all types. Put another way, it is a decision which strikes a discordant note upon reading and which asks, at the least, for careful reconsideration.

These are not, of course, the only considerations at issue here. Indeed, the claim asserted by Brian Weber—that he has been excluded from Kaiser's craft program because of race—was found sufficiently compelling by the Fifth Circuit to justify the procrustean solution imposed below. We do not intend to demean these concerns. Nor do we suggest that the matter is any less difficult than it is

controversial. We submit, however, that one's initial instinct—that there is simply "something wrong" with the regime created below—is, in the end, correct and should be followed. The purpose of this brief is to suggest, in two respects,[1] why that is so.

First, we submit that the principles applicable to private parties under Title VII differ from those applicable, for example, to governmental conduct under the Constitution.

Second, we suggest that while Title VII is unquestionably concerned with the use of race as a selection criterion in employment, the statute does not, in some instances, prohibit remedial programs for the benefit of racial minorities, who are the special concern of that statute.

I

PRIVATE CONDUCT UNDER TITLE VII IS SUBJECT TO DIFFERENT CONSIDERATIONS THAN APPLY TO GOVERNMENT CONDUCT UNDER THE CONSTITUTION

In *Bakke,*[2] a majority of this Court declared that race might be taken "into account", at least in some fashion, in the admissions decisions of a state professional school. We, of course, concur in that determination. We also sub-

[1]Recognizing our limited position as *amici,* it is not our intention to treat fully the factual and legal issues presented by this case. Given the quality of counsel, plus the numerous other *amicus* briefs anticipated on both sides, that would be, at best, redundant. What we wish to do instead is to offer a perspective from which the important issues presented here might be approached, consistent with the intent of Title VII and the competing interests at stake.

[2]*Regents of the University of California v. Bakke,* 46 U.S.L.W. 4896 (1978).

mit that whatever one's view of that aspect of *Bakke,* this case presents a materially different, and materially stronger, case for the permissible use of racial considerations.

A fundamental distinction between this controversy and a constitutional case such as *Bakke*[3] is that the conduct at issue here is not public, but private, in nature. While Kaiser, like all major corporations (indeed, like all citizens, real and artificial) is subject to a plethora of governmental obligations and restraints, there still are important differences between the private and public sectors which bear on this case.

As *Bakke* exemplifies, the underlying assumption of the Constitution generally, and of the Fourteenth Amendment specifically, is that government should act even-handedly toward all citizens. While that principle obviously does not mean that government can never treat individuals differently, it must, at the least, do so for proper purposes and in a rational manner. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 629, 634-38 (1969); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Moreover, in situations involving so-called "suspect classifications" such as race, the prevailing assumption of the equal protection clause is that government should not, as an ordinary matter, permit such factors

[3]In describing *Bakke* as a "constitutional" case, we recognize that at least four justices found it unnecessary to reach the Fourteenth Amendment question in light of Title VI (42 U.S.C. § 2000d). *Bakke, supra,* 46 U.S.L.W. at 4934 (Stevens, J., concurring in part and dissenting in part). However, even that opinion concedes that the Title VI prohibition was, for all practical purposes, simply a legislative extension of equal protection standards and principles to federally-funded programs. Thus, it is fair to consider *Bakke* a "constitutional" case, at least within the context of the discussion here. As demonstrated in text, however, the same cannot be said of Title VII. *See* pp. 7-10, *infra.*

to be taken into account as a basis for "discriminating" between citizens. While this "neutrality" principle may, of course, yield to compelling circumstances, the operative assumption in this area is exemplified by the observation, albeit hyperbolical, that the Constitution is "colorblind". *See Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Private conduct is a somewhat different matter. Here, the beginning premise is not enforced neutrality but the view that the government's powers are limited ones, and that they exist as restrictions upon, and as exceptions to, the basic right to be free from governmental control. While the extent of current statutory and administrative regulation suggests that these exceptions threaten to engulf the rule, it is nonetheless true that, in the employment area for example, absent explicit governmental intrusion, employment relationships are still a matter of private contract and may be created or terminated for reasons which would be unacceptable if relied upon by government. *See, e.g., Conrad v. Delta Air Lines, Inc.,* 494 F.2d 914, 916 (7th Cir. 1974); *Percival v. General Motors Corp.,* 400 F.Supp. 1322, 1323 (E.D. Mo. 1975); *Marin v. Jacuzzi,* 224 Cal. App. 2d 549, 553 (1964).[4] In fact, unlikely though it might be, were Congress to repeal Title VII (and 42 U.S.C. § 1981) tomorrow, private employers seemingly would again be free to discriminate on grounds of, for example, race or sex.[5] Kaiser would also, unquestionably, be free in such cir-

[4]As recently as 1908, this Court held that an employer's right to discharge *could not be* limited by federal legislation. That extreme rule is, of course, no longer good law. *See, e.g., Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177 (1941).

[5]At least insofar as federal statutory law is concerned.

cumstances to adopt its remedial crafts program. The fact that the "private" sector is free to order its own affairs—except as otherwise expressly directed—means, among other things, that the inquiry here is not even as broad as whether Title VII was intended to *grant* employers the authority to take affirmative action. Rather, the question is whether it *withdrew* that authority.

Quite apart from the public/private distinction discussed above, it is important to keep in mind that this is simply a statutory case. While that point surely is obvious, the emotional intensity on each side of so-called "reverse discrimination" cases, as well as the traditional overlay of "equal protection" considerations in race-related litigation, obscures the narrow issue actually presented. That issue, simply put, is whether Title VII permits—or, more precisely, whether it forbids—the voluntary adoption of race-based remedial programs. Had Congress been explicit on the issue of voluntary affirmative action, this case would never have arisen.

Were this a constitutional case, a set of special concerns, not present here, might bear on the analysis. *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71 Mich. L. Rev. 59, 63 (1972). Unlike the Constitution, which must necessarily be relatively fixed in interpretation and is obviously difficult to alter,[6] statutes are not so limited. If the existing contours of employment discrimination law prove unpopular, or if the need for remedial programs evaporates, it is reasonable to expect that Congress will

[6]*See Bakke, supra,* 46 U.S.L.W. at 4904; *Pollock v. Farmers Loan & Trust Co.,* 157 U.S. 429, 650-51 (1895) (White, J., dissenting).

alter or repeal existing statutes.[7] In fact, as several commentators have pointed out, the ability of the white majority to control the political process is a major bulwark against abuse, and itself is good reason to trust that process to operate satisfactorily in statutory cases. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974).

Consistent with these considerations, this Court has broadly interpreted both the power *and the intent* of Congress with respect to remedial civil rights legislation.[8] Thus, for example, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld § 4(e) of the Voting Rights Act of 1965, which prohibited the enforcement of an English literacy requirement against Puerto Ricans who were thereby deprived of the franchise. The Court interpreted Congress' remedial powers broadly and stated that it was well within Congress' authority to conclude that the need of the Puerto Rican minority for the vote warranted federal intrusion upon the interests served by the literacy requirement. The Court noted that, "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations." 384 U.S. at 653. To similar effect, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court broadly interpreted the intent of Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601

[7]It is at least equally likely that as blacks and other racial minorities achieve better educational and housing opportunities, the need for, and the use of, such special employment programs will likewise diminish. That is a wholly sensible approach to such matters, and one which is preferable to attempting to dismantle judicially-imposed affirmative action programs, with their attendant bureaucracies, court-ordered monitors, reporting requirements, etc.

[8]*See Bakke, supra*, 46 U.S.L.W. at 5905, n. 41.

et seq.) as conferring associational rights upon whites sufficient to permit them to challenge their landlord's discrimination against blacks.

Thus, Congress might have concluded that the history of employment discrimination against blacks *required* private employers to adopt affirmative action programs. The fact that, in weighing the various considerations, Congress opted for less direct intervention into private decision-making scarcely suggests that it thereby intended to prohibit the voluntary use of such programs. To the contrary, Congress *favored* voluntary attempts to alleviate the effects of racial discrimination[9]—presumably because they are the most effective, efficient and least intrusive means of dealing with such problems.

Not only has the Court been deferential to legislative power and intent, but it has also upheld the use of race-conscious solutions to achieve its purpose. Thus, again in the voting area, the Court has specifically approved a race-conscious program "reasonably related to the constitutionally valid statutory mandate of maintaining non-white voting strength." *United Jewish Organizations v. Carey*, 430 U.S. 144, 163 (1977). In that case, the Court sustained a reapportionment plan which employed a racial "quota" (*see* pages 17-18, *infra*) to secure increased representation of blacks in various voting districts for the purpose of fulfilling Congress' intent, in the Voting Rights Act of 1965, "to banish the blight of racial discrimination from voting."

[9]*See, e.g., Bakke, supra*, 46 U.S.L.W. 4921 (Brennan, J., concurring in part and dissenting in part); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 and 55 (1974); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). Remedies in the public school area have been similarly tailored to specific racial objectives and concerns,[10] and the broad discretion of local school officials to implement programs which furthered those goals was, of course, recognized in *Swann*.[11]

II

TITLE VII WAS NOT INTENDED TO FORBID THE USE OF VOLUNTARY REMEDIAL PROGRAMS TO ACHIEVE EQUAL EMPLOYMENT OPPORTUNITY

We come, then, to the question whether Congress intended to preclude the use of race-based affirmative action programs under Title VII. We submit it did not.

It would be wrong, as well as fruitless, to argue that Congress was unconcerned with eliminating the use of race as an explicit selection criterion in employment. As this Court correctly recognized in *McDonald*,[12] that concern properly extends to whites, as well as blacks and other racial minorities.

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[10] *E.g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971).

[11] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities [even] absent a finding of a constitutional violation. . . ."

[12] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

It would be equally disingenuous, however, to suggest that Congress' concern was *limited* to this neutral "nondiscrimination" principle—that is, the view that legislation such as Title VII is concerned with no more nor less than the explicit use of race—and that Title VII was not specially concerned with the employment problems of blacks. Indeed, it is probable that in the absence of historic mistreatment of blacks, Congress would not have perceived a need for Title VII or similar "civil rights" statutes at all. These laws were, in effect, a recognition of the fact that the ordinary interplay of private forces was simply inadequate, in this instance, to undo the patterns of exclusion created by centuries of unequal treatment. As this Court has observed: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was [a] to achieve equality of employment opportunities *and* [b] to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (emphasis added); *see also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).[13]

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[13] In 1971, after studying Title VII's legislative history, the editors of the Harvard Law Review concluded that:

> "Title VII, by outlawing discrimination, was [intended] to improve substantially the employment prospects of blacks. It has been suggested, therefore, that the success of Title VII (and similar state laws) can be measured by reference to statistics indicating the rate of black unemployment and the level of black income. The suggestion is fortified by the legislative history, where one finds repeated recourse to the *central syllogism:* the black community needs to be boosted closer to economic parity with the white community; Title VII will help provide this boost; therefore, Title VII should be passed." *Developments in the Law—Employment Discrimination and*

Recognition of these "dual" concerns—"non-discrimination" plus a special concern for minorities—is supported by the judicial, as well as the legislative, history of Title VII. Initially, most Title VII litigation focused upon instances in which racial animus stood behind the denial of employment benefits to blacks.[14] Indeed, the early view was that a Title VII plaintiff *was required* to demonstrate that the employer's conduct was racially motivated.[15]

This early Title VII history thus reflected the non-discrimination principle; situations involving racial animus were merely the starkest examples of the behavior which that principle prohibits.[16] However, as courts, enforcement agencies and others gained experience under Title VII, it became overwhelmingly clear that confining the application of the statute to a neutral non-discrimination standard would fail to achieve meaningful employment opportunities for blacks. As Chief Justice Burger stated in *Griggs, supra,* 401 U.S. at 431, a broader reading was required in order that Title VII "not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and fox."

Thus, as it became painfully obvious that our nation's race problems were traceable to a complex of conditions

Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1113-14 (1971).

[14]*E.g., Clark v. American Marine Corp.,* 304 F.Supp. 603, 607 (E.D. La. 1969); *Quarles v. Philip Morris, Inc.,* 279 F.Supp. 505, 509 (E.D. Va. 1968); and *United States v. H.K. Porter Co.,* 296 F.Supp. 40, 107 (N.D. Ala. 1968).

[15]*See, e.g.,* M. Sovern, *Legal Restraints on Racial Discrimination in Employment* 15, 70-73 (1966).

[16]The so-called "disparate treatment" Title VII cases (*e.g., McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)), as opposed to the "disparate impact" cases, are another example.

and to the actions and inactions of numerous individuals and institutions, it likewise became clear that Title VII would ring hollow if such persons and institutions could, Alphonse-Gaston-like, each place the blame on others and not take steps to deal with those problems. In short, to require a minority Title VII plaintiff to pin his deprivation of employment benefits squarely on the misbehavior of his employer would have materially frustrated Congressional purpose.

Concerns such as these lay behind the line of cases begun, and perhaps most clearly exemplified in this Court, by *Griggs.*[17] These cases imported, into Title VII law, a number of mechanisms which nudged open the judicial door so that the statute might achieve its special objective. These mechanisms included, among others, "impact analysis" and related statistical presumptions, rather than proof of intent (*e.g., Griggs, supra,* 401 U.S. at 430; *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974)),[18] and liberal interpretations of Title VII's pro-

[17]For example, the Court noted in *Griggs* that "[b]ecause they are Negroes, petitioners have long received inferior education in segregated schools . . . [;] Congress has . . . required that the posture and condition of the job-seeker be taken into account." 401 U.S. at 430-31; *see also McDonnell Douglas, supra,* 411 U.S. at 806.

[18]The function served by devices such as impact analysis becomes clear when one recognizes that they would not merely be unnecessary, but *invidious and unacceptable,* in the absence of historical discrimination. In such circumstances, anti-discrimination legislation would not seek to achieve employment ratios of blacks or whites which parallel their proportions in the population as a whole. For whatever reasons, members of different groups may, on the average, aspire to different jobs to different degrees. *See generally DeFunis v. Odegaard,* 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). Were it not for a history which gives us compelling reasons to be suspicious of employment statistics sharply skewed against minorities, statistical disparities would cause no special concern.

cedural requirements and mechanisms. *E.g., Oatis v. Crown Zellerbach Corporation,* 398 F.2d 496 (5th Cir. 1968). The function of these devices, endorsed and elaborated in cases as recent as *Hazelwood School District v. United States,* 433 U.S. 299 (1977), and *T.I.M.E.-D.C. v. United States,* 431 U.S. 324 (1977), was to minimize an employer's ability to perpetuate, even in good faith, the effects of historical and contemporary discrimination by others.[19]

To be sure, devices such as impact analysis did not relieve minority plaintiffs from having to establish that the defendant had unlawfully discriminated. They did, however, substantially broaden the meaning of "unlawful discrimination" in order that Title VII might at least begin to reduce the racial disparities which so concerned Congress.[20] *Compare Green v. County School Board,* 391 U.S. 430, 439 (1968) (the goal of remedial programs is that they should be made to "work, and . . . work *now*").

The line of cases represented by *Griggs* and its progeny stand for the principle that, in order to achieve its remedial purpose, Title VII extends to *something more* than the situation in which an employer has violated the neutral non-discrimination principle. Today, the Court faces the "flip side" of this issue. Whereas *Griggs* extended Title VII beyond mere non-discrimination, the Court now must decide whether Title VII, for the same reasons, prescribes *something less* than non-discrimination and permits an

[19]By forcing employers to restructure employment tests and take other steps, cases such as *Griggs* really require employers to remedy discrimination by others. Absent the historical backdrop against which Title VII rests, certainly nothing in that legislation would have required employers to improve the validity of their testing techniques.

[20]For an excellent discussion of the evolution of Title VII and litigation thereunder, see Blumrosen, *supra,* at page 7.

employer, in some instances, to adopt a race-conscious affirmative action program.[21]

We submit, of course, that the answer is "yes". As Judge Wisdom argued persuasively below (563 F.2d at 230), the Fifth Circuit's decision places employers in an untenable position.[22] That this state of affairs is unfortunate for employers we trust will be aggressively argued by Kaiser.

[21]Just how much less the Court need not decide today. Looking ahead, however, we note the United States' proposal that employers be permitted to adopt programs similar to Kaiser's when they have reasonable grounds for believing that they may have Title VII exposure. Such a formula would fall easily within the confines of existing law as an application of the "business necessity" defense. *See generally Griggs, supra.* That formula might be broadened to include situations in which the employer's conduct which preceded Title VII's 1965 effective date would have violated Title VII had it occurred later. That Congress did not give retrospective effect to Title VII hardly demonstrates that Congress intended to prohibit voluntary remedial efforts intended to offset the effects of such conduct. *Cf. Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). To the contrary, we trust that Congress would be delighted with such efforts. Still another formulation would permit employers to adopt Kaiser-type programs when some related party, for example a union, may have violated Title VII or other civil rights legislation. Finally, the Court might consider an even broader approach, as suggested by Judge Wisdom below (563 F.2d at 234), which takes into account societal discrimination generally—perhaps limited by a requirement that there be a substantial disparity between the racial profile of the employer's workforce and an appropriate "yardstick" population. In any event, Kaiser's program satisfies even the narrowest standard suggested here.

[22]Indeed, the employer's plight under the Fifth Circuit's regime may be far worse, and the likelihood that the employer would voluntarily adopt an affirmative action program far less, than Judge Wisdom suggests. As his dissent points out, if the Fifth Circuit's position prevails, an employer must expressly or implicity admit to prior unlawful acts before it can voluntarily adopt such a program. In addition, however, the affirmative action programs which the opinion below theoretically permits would be so narrowly remedial that they could not benefit minority group members other than the actual victims of the defendant's unlawful acts. Consequently, in structuring a voluntary affirmative action program, an employer would be required to admit prior wrongdoing *and* identify prospective plaintiffs.

More important for present purposes, however, is that tightening the vise around employers will virtually halt voluntary efforts to reduce the racial disparities which so concerned Congress in 1964.[23] *See* page 11 and note 13, *supra.* Save for those few employers who are convinced they will be successfully sued by minority plaintiffs in any event, employers will implement voluntary programs only if directed to do so by courts. Since courts simply lack the resources to adjudicate any significant number of discrimination cases, let alone to structure and administer complex affirmative action programs, the effect of the decision below will necessarily be to reduce the scope and effectiveness of Title VII across the board. We submit, therefore, that the reasons which justified departure from the non-discrimination principle in the *Griggs* line of cases justify such departure again today.

In urging reversal, we do not overlook the detriment incurred by individuals such as plaintiff Weber. That is, admittedly, an undesirable consequence. It is, however, a largely *unavoidable*[24] result of permitting Title VII to achieve the ends which Congress contemplated. More significantly, it is a judgment which was within the competence

[23]And again in 1972 when it amended Title VII. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 723, 751-57 (1972).

[24]The detriment incurred by plaintiff is the result of the fact that in order to provide special opportunities for blacks, it was necessary to take some away from whites. That was not, of course, Kaiser's desire, nor its "intent", as that last concept was used in such cases as *Washington v. Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). *United Jewish Organizations* demonstrates that the intent standard developed in those decisions should be applied in cases involving the explicit use of race for remedial purposes (*id.,* 430 U.S. at 169-70; Brennan, J., concurring), not merely in cases involving "neutral" actions which have racially disparate effects.

of Congress to make and the Courts to enforce. *See* pp. 7-10, *supra.*

It must also be remembered that the detriment complained of here is not unfamiliar in Title VII and other civil rights litigation. For example, in *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976), this Court approved remedial relief which without question deprived whites of employment benefits. True, *Franks* involved an instance of prior unlawful discrimination by the employer. However, the price paid by the white employees of the Bowman Transportation Co. as a result of the remedial relief endorsed in that case was identical to the price they would have paid had the company voluntarily implemented an affirmative action program in the absence of prior illegality. Indeed, if the law is to draw any distinction between race-conscious conduct which is and is not intended to compensate for an employer's prior unlawful acts, the former presents a far more appealing case for a "Weber-type" plaintiff than does the case at bar. For in that case, the plaintiff's injury *is a result of* defendant's unlawful conduct and not, for example, the defendant's desire to achieve racial harmony. *See also Teamsters v. United States,* 431 U.S. 324, 426 (1977).

Similarly, in both *United Jewish Organizations* and *Bakke,* a majority of this Court approved the use of racial considerations in circumstances inexorably involving white "victims". In the former case, plaintiffs were unquestionably deprived of their prior voting effectiveness as a consequence of Congress' desire to improve the voting leverage of blacks. It is true that the unsuccessful plaintiffs in *United Jewish Organizations* were not denied the franchise, but that is no more an answer than it was to the

gerrymandered blacks who successfully challenged race-based redistricting plans which effectively nullified the impact of their votes. *See, e.g., Gomillion v. Lightfoot,* 364 U.S. 339 (1960). And again in *Bakke,* if the proposition that race may be considered in medical school admissions decisions really has meaning, then under some circumstances individuals may be excluded from such programs on account of their race.

It comes to this: an interpretation of Title VII which fails to take account of its dual purposes would not merely be untrue to its language,[25] but would frustrate a principal objective of the statute. Perhaps in a different historic setting, a law which simply forbade the use of racial considerations would be sufficient to assure equal opportunity. However, we are not yet at that point. It thus would be unfortunate, and inappropriate, for the Court to hold now that Congress intended to forbid voluntary affirmative action programs.[26]

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[25]As others will doubtless discuss more fully, the carefully worded provision of § 703(j) of Title VII (42 U.S.C. § 2000e-2(j)), which forbids the *imposition* of affirmative action, must be read as at least implicit acceptance of voluntary remedial programs. That conclusion as to Congressional intent is reinforced by the unsuccessful legislative efforts to remove such authority by amendment, and to reverse the holdings of lower court decisions which had approved race-conscious programs. *See, e.g.,* 118 Cong. Rec. 1664-65 and 1676 (1972); and Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 1844 (1972).

[26]The result urged here leaves intact the non-discrimination analysis of decisions such as *McDonald, supra.* That case involved simply an instance of gratuitous and purposeless racial discrimination. To endorse defendant's conduct there would obviously have been inconsistent with the non-discrimination principle, and would not have furthered Title VII's additional goal of improving minority job opportunities. Moreover, reversal of the Fifth Circuit's decision here would, needless to say, have no impact upon the clearly unlawful situation in which a non-minority person is the intended victim of racial animus.

CONCLUSION

For the foregoing reasons, we respectfully urge that the decision below be reversed.

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Respectfully submitted,

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